Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-601

ROBERT K. SCHULTZE and
EDITH GEORGIANNA SCHULTZE, his wife,

Petitioners,

vs.

CHEVRON OIL CO., a California corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Opinions 1

Reasons for Denying the Writ 1

Conclusion 4

CASES CITED:

Frank H. Coulsen Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974) 2

United States v. Croft-Mullins Electric Co., 333 F.2d 772 (5th Cir. 1964) Cert. Den. 379 U.S. 968 (1964) 2

AUTHORITIES CITED:

5 Williston on Contracts, Section 670, Pages 159 to 160 (Third Edition 1961) 3

OPINIONS

The Opinions of the Court of Appeals are reported at 579 F.2d 776.

REASONS FOR DENYING THE WRIT

The Petitioners seek to justify their petition by arguing that the implied contractual covenant of good faith and fair dealing is before the Court *"de novo"* in this case and that there is a conflict between the Third and Fifth Circuits, the latter allegedly finding such an implied covenant while the former rejected same. Neither of these arguments, however, measures up.

Without even considering whether the implied covenant of good faith and fair dealing is before this Court *"de novo,"* such an implied covenant is a matter of New Jersey law, not "federal" law (this is a diversity action governed by New Jersey law) and was recognized by the Third Circuit in this case. The Third Circuit Opinion reads:

> "Apparently recognizing that the express terms of the quoted provision were unfulfilled by them, appellants argue that, in any event, Chevron violated its duty of fair dealing by not executing a written waiver of its prior right to purchase. They correctly state that New Jersey Courts recognize the principal that 'in every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good and fair dealing' 5 Williston on Contracts, Section 670, Pages 159 to 160 (Third Edition 1961)' (App. A.5.) (579 F.2d *supra* at 778)."

The implied covenant of good faith and fair dealing is not a disputed issue in this case.[1] In issue is the application of this implied covenant and other principles of law to the facts of the case. In this regard, Petitioners' arguments were considered not once, but twice—first by a panel from the Third Circuit and then by the entire Circuit on a petition for reargument *en banc*. Neither the decision of the panel majority nor that of the full Circuit in rejecting the petition was ill-considered.

This case involves the question whether Chevron was required to waive a right of first refusal in a lease between itself and the Petitioners. The Petitioners have argued that, in accordance with the *implied* covenant of good faith and fair dealing, Chevron was obligated to waive the *express* right of first refusal granted to it in the lease because it was inhibiting Petitioners' ability to procure a purchaser for their service station. Petitioners fail to recognize, however, that an implied covenant does not negate the express contract terms agreed to by the parties. As stated in *United States v. Croft-Mullins Electric Co.*, 333 F.2d 772, 776 (5th Cir. 1964) *Cert. Den.* 379 U.S. 968 (1964):

> "It is elementary that one cannot imply a term or promise in a contract which is inconsistent with an express term of the contract itself."

By the express terms of the lease in question, Chevron was required to take no action, either to exercise or waive its right of first refusal, until it was presented with a written, *bona fide* offer to purchase made by a third party. There is no dispute that a written, *bona fide* offer was

1. Moreover, it is difficult to see how a conflict among the Circuits worthy of the attention of this Court results from a decision of the Third Circuit applying New Jersey law and a decision of the Fifth Circuit under Florida law, *Frank H. Coulsen Buick v. General Motors Corp.*, 488 F.2d 202 (5th Cir. 1974), even if those Circuits had both addressed the issue and reached different conclusions.

never submitted to Chevron (Petitioners Brief at P. 4). Thus, Chevron was under no duty to waive its right of first refusal, the implied covenant of good faith and fair dealing notwithstanding.

If Chevron had been required to waive its right of first refusal, it would have lost substantial rights expressly granted by the lease. Such a loss certainly cannot be compelled by the implied covenant of good faith and fair dealing, which has as its basis that neither party shall do anything which will have the effect of causing the other party to give up the benefits it is entitled to under a contract. 5 *Williston on Contracts*, §670 (3d Ed. 1961).

Thus, the decision of the Court below was fully justified and, coupled with the fact that none of the criteria for issuing a Writ of Certiorari have been met, establishes that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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